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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-265

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
*Appellants,*

*v.*

HELEN B. FEENEY,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

## MOTION TO DISMISS OR AFFIRM

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-265

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
*Appellants,*

*v.*

HELEN B. FEENEY,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

## MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Helen B. Feeney moves that the appeal by the Attorney General of the Commonwealth of Massachusetts be dismissed. In the alternative, Helen B. Feeney moves that the judgment of the district court be affirmed.

## QUESTIONS PRESENTED

Does the Attorney General of the Commonwealth of Massachusetts have standing to file an appeal in this Court from a final judgment in an action in which he is not a party to the record and in which the parties to the record have expressly directed him not to file an appeal?

Does Mass. Gen. Laws c. 31, § 23, which excludes women from civil service positions by granting a permanent and absolute preference to veterans, violate the Fourteenth Amendment to the Constitution of the United States?

## STATEMENT

This is a direct appeal by the Attorney General of the Commonwealth of Massachusetts from a final judgment and order of a three-judge district court holding Mass. Gen. Laws c. 31, § 23, unconstitutional in that it operates to deprive female civil service applicants of equal protection of the laws and permanently enjoining the Director of Civil Service and members of the Civil Service Commission from utilizing Mass. Gen. Laws c. 31, § 23, in the selection of persons to fill civil service positions. The state's veterans' preference formula, conceded by the Attorney General to be unique to Massachusetts (J.S. 15), operates predictably and systematically as an absolute bar to the employment of women in public service jobs of the Commonwealth of Massachusetts, except for lower-level, lower-paying positions for which males have traditionally not applied.

The plaintiff in this action is Helen B. Feeney, a female resident of the Commonwealth of Massachusetts, who, as a result of application of the state's veterans' preference formula, was excluded from consideration for a number of civil service positions for which she had applied. (J.S. 12a-14a)

Named as defendants in this action in the district court were the Commonwealth of Massachusetts, the Division of Civil Service of the Commonwealth of Massachusetts, Edward W. Powers, as Director of Civil Service, and Nancy B. Beecher, Wayne A. Budd, Joseph M. Duffy, Richard J.



Healy and Helen C. Mitchell, as members of the Civil Service Commission.[1]

The case was heard upon an agreed statement of facts which is summarized in the opinion of the district court. (J.S. 3a) On March 29, 1976, the district court entered an order and opinion granting judgment in favor of Helen B. Feeney against the named individual defendants.[2] (J.S. 1a)

On May 25, 1976, the Attorney General of Massachusetts filed a Notice of Appeal to the Supreme Court of the United States on behalf of the Personnel Administrator of the Commonwealth and the members of the Massachusetts Civil Service Commission and sought a stay of the judgment and order from which the appeal was taken. The parties filed in the district court a stipulation[3] as to the following facts:

(1) Defendants Kountze and the members of the Civil Service Commission, individually and in their official capacities, have not authorized and are opposed to the appeal from the district court's order.

(2) The defendants have formally requested that no appeal be filed on their behalf by the Attorney General.

(3) The defendants have asked the Attorney General of Massachusetts to appoint a Special Assistant Attorney General to represent their interests in all further proceedings in this case.

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[1] The position of Director of Civil Service has been eliminated and his duties transferred to the Personnel Administrator of the Commonwealth who is presently Wallace Kountze. The members of the Civil Service Commission are presently Amelia Miclette, Wayne A. Budd, John Donegan, Richard J. Healy, and Richard Linden.

[2] The Commonwealth of Massachusetts and the Division of Civil Service were dismissed as parties on the grounds that they were not "persons" within the meaning of 42 U.S.C. § 1983.

[3] The stipulation is reproduced as Appendix A to this Motion.

(4) The Governor of Massachusetts, the Honorable Michael S. Dukakis, in his official capacity as Chief Executive Officer of the Commonwealth, is opposed to an appeal from the judgment of the district court and has requested the Attorney General not to file an appeal on behalf of the defendants.

On August 23, 1976, the Attorney General of Massachusetts filed a Jurisdictional Statement in this Court which purported to be submitted on behalf of the Personnel Administrator of the Commonwealth and the members of the Massachusetts Civil Service Commission.[4]

## ARGUMENT

### I. The Appeal Should Be Dismissed Because No Party to the Record and Judgment of the District Court Has Authorized an Appeal to This Court.

The appeal should be dismissed under Rule 16 of this Court in that it has not been taken in conformity to statute or to the rules of this Court. The Attorney General of Massachusetts has not been authorized to prosecute an appeal to this Court by any party to the record and judgment of the district court, nor was he himself a party to that record. He therefore lacks standing to prosecute this appeal.

The Attorney General has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1253, which states that

[4] In a letter dated September 1, 1976, addressed to the Clerk of this Court, Wallace H. Kountze and Amelia Miclette, as Chairman of the Civil Service Commission, informed this Court that "the appeal is without our authorization" and that the jurisdictional statement was filed "without our consent and contrary to our express requests." The letter concluded: "Therefore, pursuant to 28 U.S.C. Section 1654, and acting in our own behalf as all of the parties appellant to this appeal, we request that the Court dismiss the appeal."



". . . any *party* may appeal to the Supreme Court. . ." (emphasis added).[5] The Attorney General is not a party. He was the attorney for the parties in the district court, but attorneys cannot file appeals in federal courts unless authorized by a party. *Brown* v. *Grand Trunk Western R. Co.*, 124 F.2d 1016 (6th Cir. 1941); *cf. Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315 (1927). None of the parties to the record and judgment of the district court, all of whom are public officials of the executive branch of the Commonwealth of Massachusetts responsible to its Governor, have authorized the Attorney General to appeal on their behalf. Appendix A, *infra*, 1a-4a.

These defendants have a federal right to conduct their own cases personally and to represent their own particular interests. 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally . . . ."). Both the defendants and the Governor specifically requested the Attorney General not to file an appeal on behalf of the defendants. Appendix A, *infra*, 1a-4a.

These requirements of statute and rule reflect a concern for the orderly administration of the federal judiciary and for the "case or controversy" requirement of Article III. It has long been settled by this Court that "[o]ne who is not a party to a record and judgment is not entitled to appeal therefrom." *In the Matter of Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911); *South Carolina* v. *Wesley*, 155 U.S. 542 (1895); *Bayard* v. *Lombard*, 50 U.S. (9 How.) 530 (1850). The established federal rules are no different

[5] This Court's own Rules relating to jurisdiction on appeal contemplate that "parties to the proceeding in the court from whose judgment the appeal is taken shall be deemed parties in this court . . . ." See Rule 10(4) and, generally, Rules 10-16. See also *United Auto Workers* v. *Scofield*, 382 U.S. 205, 208-209 (1965) ("Under § 1254(1) of the Judicial Code, only a 'party' to a case in the Court of Appeals may seek review here.")

for attorneys general seeking to represent the general interests of a state. *United States ex. rel. Louisiana* v. *Jack,* 244 U.S. 397 (1917); see also *United States* v. *Seigel,* 168 F.2d 143 (D.C. Cir. 1948).

This Court need not and should not discard settled principles of judicial proceeding in federal courts to extricate the Attorney General from the position in which he finds himself: he represents no party to the record and judgment below who has invoked this Court's jurisdiction.

The Attorney General cannot rest his right to appeal on authority conferred by Mass. Gen. Laws c. 12, § 3.[6] (J.S. 1) Claims of authority to proceed in federal court based on state law are inappropriate ". . . in the face of the long term perfectly settled law that equity suits in federal courts and the appellate procedure in them are regulated exclusively by federal statutes and decisions unaffected by statutes of the States." *United States ex rel. Louisiana* v. *Jack, supra,* 244 U.S. at 403.

Moreover, this statute does not authorize the Attorney General to represent the state or any of the public officials of either the executive or legislative branch of state government in tribunals other than the courts of Massachusetts unless he is expressly requested to do so by the governor or the legislature. In this case, the Governor has expressly requested the Attorney General *not* to represent, or file an appeal on behalf of, the public officers of the executive branch who are the parties to the record.[7] While the legislative branch of state government has passed resolutions[8] generally exhorting the Attorney General to appeal, those resolutions fall far short of an express directive to the Attorney General to disregard the will of the executive branch, through its Governor, and to file an appeal on behalf of the executive officers who are parties to the record.[9] All that the legislative branch has done in this case is pass general precatory resolutions which on their face are not binding on anyone, even the Attorney General.

Parties in federal courts represent ascertainable interests which determine standing to invoke federal jurisdiction under Article III of the Constitution. The filing of an appeal on behalf of executive branch officials, contrary to their express desire and contrary to the express desire of the

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[6] This statute is reproduced in Appendix B to this Motion.

[7] This is not a case of lower echelon public officials defying the will of lawful superiors. The defendants are officials of the executive branch of the Commonwealth of Massachusetts, responsible to the Governor who is the "supreme executive magistrate." Part II, c. 2, § 1, art. 1 of the Constitution of Massachusetts. The Governor opposes the appeal. Thus, it is the policy determination and will of the executive branch of the state government, through its Governor, to whom the parties to the record are responsible, that there be no appeal.

[8] Both houses of the state legislature passed virtually identical resolutions on April 6, 1976. The operative portion of the resolution of the Massachusetts Senate was:

> "*Resolved,* That the Massachusetts Senate hereby respectfully urges the Attorney General of the Commonwealth to appeal the decision rendered by said federal court in said case of *Feeney* v. *Commonwealth, et al,* with all due vigor and to its final judgment by the Supreme Court of the United States . . . ."

[9] Under these circumstances, there is no need for this Court to resolve the difficult questions which would be presented not only under Mass. Gen. Laws c. 12, § 3, but also under the Massachusetts Constitution, Part II, c. 2, § 1, art. 1, if there were a conflict between the chief executive and the legislature over the direction and control of the litigation decisions of executive branch officials in federal court. Cf. *United States* v. *Nixon,* 418 U.S. 683, 693 (1974) ("[T]he Executive has exclusive authority and absolute discretion to decide to prosecute a case.").

executive branch, is an act contrary to their specific interests. If the Attorney General believed that state law gave either him or the legislature an interest sufficient for federal court jurisdiction, he should have moved to intervene as a party.[10] As it stands, there is no party who has invoked this Court's jurisdiction. The appeal should be dismissed.

## II. The Decision of the District Court Should Be Affirmed.

### A. The District Court Correctly Applied the Standard of Judicial Scrutiny Appropriate for Constitutional Review of a Statute That Discriminates Against Women.

This case involves a state statute which, by granting a lifetime, absolute preference to veterans, foreseeably and systematically bars virtually all women of the state "from all areas of civil service employment not shunned by men." (J.S. 34a) (Campbell, J., concurring) The district court found that the veterans' preference formula used by Massachusetts in making appointments to state civil service positions, given the virtual exclusion of women from the armed services, "inescapably" leads to the denial to women of any meaningful opportunity to compete for these jobs, without regard to their demonstrable professional qualifications. (J.S. 26a)

This finding has two major premises. First, women, as a class do not benefit from the veterans' preference formula. As the district court noted: "Facially, the Veterans'

[10] The interests of a legislature are easily protected under available federal procedures. The legislature could have sought to intervene in this action. If the legislature had a sufficient interest to permit it to become a party, the Attorney General could have appealed on its behalf. See, *e.g.*, *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972).



Preference is open to both men and women. But to say that it provides an equal opportunity for both men and women to achieve a preference would be to ignore reality." (J.S. 27a) As a result of the deliberate exclusion of women from the military, few women are veterans, and few will become veterans so as to qualify for the preference. Second, the preference is absolute. "Eligible veterans, regardless of qualifications relative to eligible non-veterans, have the public employment field cleared for them on an absolute and permanent basis." (J.S. 24a)

The district court termed "disastrous" the impact of veterans' preference on the employment opportunities of women in Massachusetts. (J.S. 27a) Women are effectively barred from all but low-paying jobs shunned by men. "Few, if any, females have ever been considered for the higher positions in the state civil service." (J.S. 26a)

The absolute preference thus guarantees the perpetuation of centuries of discrimination against women. See *Frontiero* v. *Richardson*, 411 U.S. 677, 684-685 (1973). It has produced a civil service workforce which has two distinct classes of employees: one is male and occupies the higher-paying, higher-grade, policy-making positions in Massachusetts government; the other is female and occupies the lower-paying, lower-grade positions, such as clerk and secretary, for which men traditionally have not applied.

In passing on the constitutional validity of the state's veterans' preference formula, the district court expressly employed the standard of judicial scrutiny formulated in *Reed* v. *Reed*, 404 U.S. 71 (1971) and consistently applied by this Court in cases involving sex discrimination. (J.S. 19a-20a) See *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Schlesinger* v. *Ballard*,

419 U.S. 498 (1975); *Kahn* v. *Shevin*, 416 U.S. 351 (1974); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). The standard of review employed in these cases requires less than strict judicial scrutiny but more than the passive review inherent in the "mere rationality" test. The district court's use of this intermediate standard was clearly correct.[11]

The near-total exclusion of women which necessarily results from the veterans' preference formula requires the same standard of review as the limited statutory preference of men over women at issue in *Reed* v. *Reed*, *supra*. Heightened judicial scrutiny is particularly appropriate where, as here, the challenged classification produces a wholesale denial of equal access to employment in a major sector of the state's economy. *Truax* v. *Raich*, 239 U.S. 33 (1915); cf. *Hampton* v. *Mow Sun Wong*, — U.S. —, 96 S. Ct. 1895, 1905 (1976).

Moreover, this is the standard of review apt for statutes which impose legal burdens and penalties on a whole class of women, through no fault or choice of their own, and which are ". . . contrary to the basic concept of our system that legal burden should bear some relationship to individual responsibility or wrongdoing." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

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[11] *Massachusetts Board of Retirement* v. *Murgia*, — U.S. —, 96 S. Ct. 2562 (1976), is inapposite. That case dealt with a legislative classification based on age, a condition which this Court noted "marks a stage that each of us will reach if we live out our normal span." *Id.* at 2567. It does not stand for the proposition, as the Attorney General suggests, that minimal scrutiny should be applied to classifications that discriminate against women. The Court in *Murgia* did not purport to overrule *Reed* v. *Reed*, *supra*, or the line of cases that follow it, or to abandon the application of its standard of review in appropriate cases. Indeed, four days after its decision in *Murgia*, this Court applied the *Reed* standard in *Mathews* v. *Lucas*, — U.S. —, 96 S. Ct. 2755 (1976). Nor does *Murgia* signal an abandonment by this Court of its recognition of "the severity or pervasiveness of the historic legal and political discrimination against women. . . ." *Mathews* v. *Lucas*, *supra*, at 2762.



Applying the test articulated in *Reed*, the district court, while recognizing the legitimacy of the state's objective, addressed "[t]he crucial question . . . whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause." *Reed* v. *Reed*, *supra*, at 76. This necessarily involved examination of the suitability of the particular means chosen by the state to achieve its objective. See, *e.g.*, *Frontiero* v. *Richardson*, *supra*; *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Andrews* v. *Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir.), *cert. granted*, 423 U.S. 820 (1975).

In reviewing the means selected by the Massachusetts legislature to assist veterans, the district court properly and, indeed, necessarily considered the availability of alternatives to the absolute preference. The court noted that an absolute preference is not the only means by which the state could assist veterans in the area of public employment. It emphasized that "Massachusetts has considerable flexibility in the manner in which it can aid its veterans." (J.S. 28a) Given the availability of alternative methods of assisting Massachusetts veterans which would not absolutely and permanently disadvantage the women of Massachusetts, the district court was correct in concluding that there was no legitimate or rational reason for the state's adoption of an absolute preference, and that the statute was, therefore, unconstitutional.

Affirmance of the decision of the district court would not invalidate the preferences granted to veterans by other states or the federal government. The district court based

its decision on the narrow ground that the *absolute* preference of veterans within the context of the Massachusetts civil service system necessarily excludes women from significant employment opportunities. The district court explicitly indicated that the system of preference used by the federal government (and, in fact, by virtually all other states) would not necessarily have the same infirmity.

### B. The Decision of the District Court is Consistent With Washington v. Davis.

The recent decision by this Court in *Washington* v. *Davis,* — U.S. —, 96 S. Ct. 2040 (1976), does not impair the soundness of the decision of the district court. In *Washington* v. *Davis, supra,* this Court held that a statute, designed to serve neutral ends, is not unconstitutional *solely* because it has a disproportionate impact on one class of persons. (J.S. 9-11) A careful scrutiny of the deliberate use in Mass. Gen. Laws, c. 31, § 23, of a non-neutral selection criterion that operates foreseeably and systematically to bar women as a class from public employment jobs in Massachusetts reveals that the judgment of the district court is wholly consistent with the standards set forth in *Davis.*

While the Attorney General does not dispute the severity of the impact upon women caused by the state's use of a lifetime, absolute preference for veterans,[12] he ignores the

[12] "Few, if any, females have even been considered for the higher positions in the state service." Opinion of the district court. (J.S. 26a)

"[A]ll women, except the very few who are veterans, are effectively and permanently barred from all areas of civil service employment not shunned by men." Concurring Opinion of Circuit Judge Campbell. (J.S. 34a)



fact that the preference statute is, by design, not neutral and erroneously characterizes the district court's judgment as based "solely" on its impact. (J.S. 10)

In marked contrast with the neutral purpose and effect of the employment test before this Court in *Washington* v. *Davis, supra,*[13] the Veterans' Preference Act, Mass. Gen. Laws, c. 31, § 23, is manifestly designed not to apply neutrally to all persons. Rather, as the district court found, it "is a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group of its citizens, those who qualify as veterans, by giving them an absolute and permanent preference in public employment". (J.S. 21a) This non-neutral end necessarily "succeeds at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts' women," (J.S. 21a) producing "a near blanket, permanent exclusion of all women from a major sector of employment." (J.S. 34a) (Campbell, J., concurring) This is akin to the "wholesale" deprivation of eligibility for public employment to a "discrete class of persons" found to warrant constitutional scrutiny in *Hampton* v. *Mow Sun Wong,* — U.S. —, 96 S. Ct. 1895 (1976).

The wholesale discrimination against women which was found by the district court to result from the Massachusetts veterans' preference statute is purposeful and deliberate,

[13] This Court was faced in *Davis* with a challenge to the use of a neutral test of verbal skills which the district court found was not "culturally slanted" to favor whites and which was "neither designed nor operated to discriminate against otherwise qualified blacks." The test had been "designed to serve neutral ends" and only served to require all applicants to meet a uniform minimum standard of communicative skills. The Court of Appeals found the test unconstitutional based *solely* on the statistically disproportionate impact of the test on blacks. This Court reversed because disproportionate impact, while not irrelevant, is not the "sole touchstone" of a discrimination forbidden by the Constitution. On the facts, this Court held that the impact did not warrant the conclusion that the test was "a purposeful device to discriminate". *Washington* v. *Davis, supra,* 96 S. Ct. at 2051.

regardless of whether the discrimination was the express or principal purpose of the statute. Besides finding a disproportionate impact, the district court found additionally that the exclusion of women was "inescapable". (J.S. 9a) The district court recognized that "decades of restrictive federal enlistment regulations" prevented women from becoming veterans. (J.S. 20a) By preferring veterans absolutely, the state necessarily excludes virtually all women from employment and renders the operation of the statute "anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women."[14] (J.S. 20a)

State officials, like all responsible actors, are considered to intend the "natural and foreseeable consequences" of their actions. As Mr. Justice Stevens observed in his concurring opinion in *Washington* v. *Davis, supra,* 96 S. Ct. at 2054:

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation."

This familiar doctrine has frequently been invoked where intent is a requisite element in a discrimination claim. See, *e.g., NLRB* v. *Great Dane Trailers,* 388 U.S. 26, 33 (1967) (discrimination in violation of § 8(a)(3) of the National Labor Relations Act); *United States* v. *Texas Ed. Agency,* 532 F.2d 380, 388-389 (5th Cir. 1976). Similarly, in *Monroe*

[14] This Court in *Washington* v. *Davis, supra,* reaffirmed the proposition that disproportionate impact combined with the use of "non-neutral selection procedures" would be sufficient to make out a *prima facie* case of purposeful discrimination warranting constitutional scrutiny. 96 S. Ct. at 2048.



v. *Pape,* 365 U.S. 167, 187 (1961), this Court rejected specific intent as an element of a cause of action under 42 U.S.C. § 1983 and held that it "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

In light of the foregoing, it is clear that Massachusetts' relegation of women to a position of inferiority in the selection process for public service jobs is purposeful within the meaning of this Court's decision in *Washington* v. *Davis, supra.* Thus, the district court's decision is wholly consistent with the constitutional standards articulated in that case.

## CONCLUSION

For the reasons stated herein and by the district court, the appeal should be dismissed. Alternatively, the judgment of the district court should be affirmed.

Respectfully submitted,

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**APPENDIX A**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| HELEN B. FEENEY, *Plaintiff* v. THE COMMONWEALTH OF MASSACHUSETTS, et al., *Defendants* | CIVIL ACTION NO. 75-1991-T |

**STIPULATION**

The parties in this action stipulate and agree to the following facts, without conceding the materiality or relevance thereof:

1. Wallace H. Kountze is the Personnel Administrator of the Division of Personnel Administration of the Commonwealth and a defendant in this action.

2. In his official capacity as Personnel Administrator of the Commonwealth, a defendant in this action and individually, Mr. Kountze has not authorized and opposes an appeal from the judgment of this Court to the United States Supreme Court.

3. In his official capacity as Personnel Administrator of the Commonwealth, a defendant in this action and individually, Mr. Kountze has not authorized and opposes the filing on his behalf by the Attorney General of the Notice of Appeal, the Motion for Stay of Judgment, the Motion for

Relief from Judgment and the Supplementary Motion for Relief from Judgment now pending before the Court.

4. After reviewing the judgment and order of this Court entered on March 29, 1976, Mr. Kountze wrote to the Attorney General on March 31, 1976, requesting that no appeal be filed on his behalf. (A true copy of that letter is attached hereto as Exhibit A.) He has stated in an affidavit previously filed with this Court that he did not request the filing of the motion for a stay and the motion for relief from judgment.

5. Mr. Kountze was not consulted by the Attorney General prior to the filing of the documents referred to in paragraph 3, above, nor was Mr. Kountze at any time consulted by the Attorney General concerning the effect that the granting or denial of any of these motions would have on the administration of the civil service system of the Commonwealth. Counsel for the Division of Public Administration has consulted with the office of the Attorney General on these matters and has informed that office that the granting of these motions would cause some difficulty in the administration of the civil service system.

6. In a letter dated May 27, 1976 from Amelia Miclette, Chairperson of the Civil Service Commission to the Attorney General, the Attorney General was asked to appoint a Special Assistant Attorney General to represent Mr. Kountze and the members of the Civil Service Commission in all further proceedings in this action. (A true copy of this letter is attached hereto as Exhibit B.)

7. The Attorney General has not met with Mr. Kountze personally to discuss his opposition to a stay and to an appeal, or his reasons therefor, or to discuss his request that his interests be represented by a Special Assistant Attorney General.



8. Given the Attorney General's filing of the Notice of Appeal and the motions described in paragraph 3 over Mr. Kountze's objection, Mr. Kountze wishes to be represented by a Special Assistant Attorney General in all further proceedings in this action.

9. The individual members of the Civil Service Commission in their official capacities as members of the Commission and as they collectively comprise the Commission are defendants in this action.

10. The members of the Civil Service Commission in their official capacities, as they comprise the Commission, and as defendants in this action, have not authorized and oppose an appeal from the judgment of this court to the United States Supreme Court.

11. The members of the Civil Service Commission, in their official capacities, as they comprise the Commission, and as defendants in this action, have not authorized and oppose the filing on their behalf by the Attorney General of the Notice of Appeal, the Motion for Stay of Judgment, the Motion for Relief from Judgment and the Supplemental Motion for Relief from Judgment.

12. After reviewing the judgment and order of this Court entered on March 29, 1976, the Civil Service Commission voted on March 31, 1976 to request the Attorney General not to appeal on behalf of the Civil Service Commission and its individual members. The Attorney General was informed of this request by letter dated March 31, 1976 from Amelia L. Miclette, Chairperson of the Civil Service Commission. (A true copy of this letter is attached hereto as Exhibit C.)

13. None of the defendant members of the Civil Service Commission were personally consulted by the Attorney

General after May 25, 1976 concerning any of the matters which are now pending before the Court.

14. As of June 21, 1976, the Attorney General had not met with the members of the Civil Service Commission to discuss their opposition to a stay and to an appeal, or their reasons therefor, or to discuss their request that their interests be represented by a Special Assistant Attorney General.

15. Given the Attorney General's filing of the Notice of Appeal and the motions described in paragraph 11 over their objection, the members of the Civil Service Commission wish to be represented by a Special Assistant Attorney General in all further proceedings in this action.

16. The documents, attached hereto, marked "A," "B," "C," and "D" are true copies of letters to the Attorney General from and on behalf of the defendants set forth therein.

17. The Governor of the Commonwealth of Massachusetts is Michael S. Dukakis. The Governor in his official capacity as the chief executive officer of the Commonweatlh opposes the filing of an appeal from the judgment of the Court in this action and the motion for a stay and the various other motions filed by the Attorney General on behalf of the defendants who are officials of the executive branch of government of the Commonwealth. The basis for the Governor's opposition is that such actions are not in the interests of the defendants or the Commonwealth and its citizens or otherwise in the public interest. The Governor has requested the Attorney General not to file an appeal on behalf of the defendants and, through his counsel, not to seek a stay, reconsideration or modification of the Court's judgment and order. On June 21, 1976, the Governor, through his counsel, requested the Attorney General to



appoint a Special Assistant Attorney General to represent the defendants in all further proceedings in this action.

18. The list of persons constituting a list of eligible persons certified for appointment to the fire department of Boston has since May 28, 1976 been supplemented by the names of additional eligibles. There is at least one woman who is eligible for appointment to the Boston Fire Department who has not yet been certified to the appointing authority but who in the opinion of Wallace H. Kountze, the Personnel Administrator will be at some time in the future certified for appointment.

19. In the opinion of Wallace H. Kountze, the Personnel Administrator for the Commonwealth, no confusion or difficulty in the administration of the Division of Personnel Administration of the Commonwealth has resulted from compliance with the Court's order heretofore entered in this action.

| THE PLAINTIFF<br>By her attorney, | THE DEFENDANTS<br>By FRANCIS X. BELLOTTI,<br>*Attorney General* |
|---|---|
| JOHN REINSTEIN<br>68 Devonshire Street<br>Boston, Massachusetts 02109 | THOMAS R. KILEY<br>*Assistant Attorney General*<br>One Ashburton Place<br>Boston, Massachusetts 02108 |

June 21, 1976

EXHIBIT "A"

**THE COMMONWEALTH OF MASSACHUSETTS**
***Executive Office for Administration and Finance***
**One Ashburton Place, Boston 02108**
**OFFICE OF THE PERSONNEL ADMINISTRATOR**

March 31, 1976

HONORABLE FRANCIS X. BELLOTTI
Attorney General
Room 373
State House
Boston, Massachusetts 02133

Dear Attorney General Bellotti:

As the Personnel Administrator of the Commonwealth, the statutory successor to the Director of Civil Service (c. 835 of the Acts of 1974), I have read the opinion and order in the Veterans' Preference cases (*Anthony* v. *Commonwealth; Feeney* v. *Commonwealth*) and it is my opinion that the matter should not be appealed to the Supreme Court of the United States. Accordingly, I request that you, as my legal representative pursuant to M. G. L. c. 12, s. 3, not file an appeal on my behalf.

Sincerely,

WALLACE H. KOUNTZE
*Personnel Administrator*

WHK:km



EXHIBIT "B"

**THE COMMONWEALTH OF MASSACHUSETTS**
***Executive Office for Administration and Finance***
**One Ashburton Place, Boston, Ma. 02108**
**CIVIL SERVICE COMMISSION**

May 27, 1976

ATTORNEY GENERAL FRANCIS X. BELLOTTI
Office of the Attorney General
20th Floor, One Ashburton Pl.
Boston, Mass. 02108

Re: Helen B. Feeney, *Plaintiff*
*v.*
The Commonwealth of Massachusetts, Et Al,
*Defendants*

Dear General Bellotti:

I write you on behalf of the members of the Civil Service Commission and the Administrator of the Division of Personnel Administration, Wallace H. Kountze, all defendants in the above captioned matter.

We have been advised that your office has undertaken steps to seek a stay of judgment in this case in the United States District Court for the District of Massachusetts as well as to appeal the matter to the United States Supreme Court. While we recognize your legal right to take these actions, we nevertheless remain opposed to both the stay and the appeal. Therefore, we strongly believe that we are in need of legal counsel to represent our interests and a formal request is hereby made for the appointment of a

Special Assistant Attorney General to act as our Counsel in these proceedings.

The matter is of such grave concern and importance to us, and our need for counsel is so pressing, that we seek the opportunity to meet with you as soon as possible to discuss the ramifications of our position.

We await hearing from you in this regard at the earliest possible time.

Very truly yours,

AMELIA L. MICLETTE, *Chairperson*
Civil Service Commission

ALM:rf
CC: WALLACE H. KOUNTZE, *Personnel Administrator*



**EXHIBIT "C"**

**THE COMMONWEALTH OF MASSACHUSETTS**
***Executive Office for Administration and Finance***
**One Ashburton Place, Boston, Ma. 02108**
**CIVIL SERVICE COMMISSION**

March 31, 1976

FRANCIS X. BELLOTTI
Attorney General
Office of the Attorney General
State House, Room 373
Boston, Massachusetts 02133

RE: Carol A. Anthony, et al.
*v.*
The Commonwealth of
Massachusetts, et al.

Helen B. Feeney
*v.*
The Commonwealth of
Massachusetts, et al.

Dear Attorney General Bellotti:

At its meeting of March 31, 1976, the Civil Service Commission voted that:

1) The Commission recognizes and appreciates the interest of individual veterans, their associations, and their representatives in having the above named decision appealed to a higher court. However, the Commission is unwilling to be a party to such an appeal.

2) The Commission believes that the most appropriate course of action at the present time is for the legis-

lature to enact an alternative procedure to provide preference for veterans along the line spelled out in the decision of the federal court.

3) Accordingly, the Commission requests the Attorney General that no appeal be made in this matter in the name of the Civil Service Commission and its individual members.

Should you decide to pursue further the matter of the appeal, the Commission would respectfully request the opportunity to meet with you in order to share its views in this regard.

Sincerely,

AMELIA L. MICLETTE, *Chairperson*
Civil Service Commission

ALM:jz
cc: SECRETARY JOHN R. BUCKLEY
WALLACE H. KOUNTZE
*Personnel Administrator*



**EXHIBIT "D"**

**THE COMMONWEALTH OF MASSACHUSETTS**
***Executive Office for Administration and Finance***
**State House, Boston 02133**

March 31, 1976

THE HONORABLE FRANCIS X. BELLOTTI
Attorney General of the Commonwealth
John W. McCormack Building
One Ashburton Place
Boston, Massachusetts 02108

Dear Attorney General Bellotti:

I have reviewed the opinion and order of the Court in the cases of *Anthony et al* v. *Commonwealth of Massachusetts et al* (CA 74-5061-T) and *Feeney* v. *Commonwealth of Massachusetts et al* (CA 75-1991-T), the so-called Veterans' Preference cases, and have concluded that the matter does not merit further judicial review. Accordingly, I would support the requests of both the Personnel Administrator and the Civil Service Commission, forwarded to you herewith, that you not appeal this case to the Supreme Court of the United States.

I am aware that the decision to enjoin utilization of Veterans' Preference has an impact on the state's personnel system which I have the ultimate responsibility of overseeing. The delay and uncertainty caused by an appeal might well further complicate administration of that system. Accordingly, my office has already begun to work with the Legislature to formulate legislation which would further the legitimate governmental interest of rewarding veterans while not working to the permanent and absolute disadvantage of the women of the Commonwealth.

Sincerely yours,

JOHN R. BUCKLEY
*Secretary*

JRB:j

## APPENDIX B

Mass. Gen. Laws c. 12, § 3:

"The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction."